

Annex 2



**Internal memorandum
Memorandum interne**

To À	Judge Sanji Monageng	From De	The Presidency <i>SHL</i>
Date	19 April 2012	Through Via	
Ref.	2012/PRES/00230-5	Copies	Judge Erkki Kourula, President of the Appeals Division
Subject Objet	Decision on the request of Judge Monageng to be excused from the exercise of judicial functions in the Appeals Chamber pursuant to article 41 of the Rome Statute		

The Presidency, composed of the President (Judge Sang-Hyun Song), the Second Vice President (Judge Cuno Tarfusser) and Judge Akua Kuenyehia, hereby decides upon the request of Judge Sanji Monageng ("applicant") of 16 April 2012 to be excused from her functions as a judge of the Appeals Chamber in the "Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi'"¹ in the case of *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ("request for excusal").

The request for excusal is denied.

Factual background

By memorandum dated 16 April 2012, the applicant requested the Presidency to be excused from her functions as a judge of the Appeals Chamber in the "Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi'" ("appeal") in the case of *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ("case") against Pre-Trial Chamber I's "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi" ("Second Postponement Decision"),² pursuant to article 41(1) of the Rome Statute ("Statute") and rule 33 of the Rules of Procedure and Evidence ("Rules").³ By

¹ ICC-01/11-01/11-103, 10 April 2012.

² ICC-01/11-01/11-100, 4 April 2012.

³ 2012/PRES/00230.

memorandum of 18 April 2012, the applicant requested the Presidency to excuse her, in her capacity as First Vice-President, from the deliberations of the Presidency on the request for excusal.⁴ That same day, noting article 41(1) of the Statute and rule 33 of the Rules, the remaining members of the Presidency granted the latter request in order to prevent a conflict of interest from arising, bearing in mind the position of the applicant as both a member of the Presidency and a judge of the Appeals Chamber. Pursuant to regulation 11(2) of the Regulations of the Court ("Regulations"), the applicant was treated as unavailable for the purpose of the deliberations of the Presidency on the request for excusal.⁵ That same day, Judge Akua Kuenyehia assumed the responsibilities of the applicant as a member of the Presidency in the request for excusal, in accordance with regulation 11(2) of the Regulations.⁶

The applicant submits her request for excusal based upon her previous involvement in the pre-trial phase of the case, during which she, *inter alia*, rendered a decision on a request by the government of Libya that was similar to the Second Postponement Decision.

The appeal concerns articles 19 and 95 of the Statute, as well as rule 58 of the Rules, with the government of Libya arguing that the Pre-Trial Chamber, in the Second Postponement Decision, "was wrong to assert that there was no admissibility challenge under consideration such that article 95 could be relied upon to found the postponement request",⁷ arguing that the Pre-Trial Chamber failed to interpret correctly the complex relationship between articles 19 and 95 of the Statute and rule 58 of the Rules.⁸ The substantive relief requested in the appeal is that the Second Postponement Decision be overturned and the government of Libya's request for postponement of the order to surrender Mr. Saif Al-Islam Gaddafi be granted pending the determination of an admissibility challenge.⁹

The Presidency briefly notes that the Second Postponement Decision, which is the subject of the appeal, determined that the request of the government of Libya for a postponement must be rejected on the basis that "article 95 of the Statute only applies when there is an admissibility challenge under consideration. Though Libya has

⁴ 2012/PRES/00230-2.

⁵ 2012/PRES/00230-3.

⁶ 2012/PRES/00230-4.

⁷ Appeal, paragraph 19.

⁸ See Appeal, paragraphs 18-24.

⁹ Appeal, paragraph 30.

announced that an admissibility challenge is forthcoming, there is currently no such challenge before the Chamber”.¹⁰

The relevant pre-trial decision in the case in which the applicant participated is not the Second Postponement Decision, but the earlier “Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi” (“First Postponement Decision”).¹¹ The First Postponement Decision was taken at a time when the Libyan authorities were “not contesting the admissibility of the case”.¹² The issue in the First Postponement Decision was whether article 94(1) of the Statute allowed for the postponement of requests for surrender made pursuant to article 89 thereof.¹³

Decision

The request for excusal is properly before the Presidency, in accordance with article 41 of the Statute and rule 33 of the Rules.

The Presidency, having thoroughly examined the matter before it, denies the request.

The Presidency recalls that, pursuant to rule 35 of the Rules, there is a duty upon a judge to request to be excused in the absence of a request for disqualification, should he or she believe that a ground for disqualification exists. The Presidency further recalls that article 41(2)(a) of the Statute provides, in relevant part:

A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court...

The Presidency has previously found that the capacities with which the second sentence of article 41(2)(a) is concerned are those by virtue of which the impartiality of a judge might reasonably be doubted.¹⁴ The Presidency found this interpretation

¹⁰ Second Postponement Decision, paragraph 18.

¹¹ ICC-01/11-01/11-72, 7 March 2012.

¹² First Postponement Decision, paragraph 8.

¹³ First Postponement Decision, paragraphs 13-16.

¹⁴ Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, 23 September 2009, as contained in ICC-01/04-01/06-2138-AnxIII, 13 November 2009, page 6 (hereinafter “Decision of 23 September 2009”).

most consistent with the objective of ensuring that the impartiality of judges cannot reasonably be reproached, at the same time as ensuring the efficient conduct of proceedings.¹⁵

The Presidency has previously determined that, even in circumstances where a judge has issued a warrant of arrest in a case, this does not necessarily give rise to reasonable grounds to doubt the impartiality of that judge in appellate proceedings in general.¹⁶ In addition, the Presidency has also previously determined that limited involvement by a judge in a discrete procedural motion does not constitute a ground on which the impartiality of a judge might be reasonably doubted.¹⁷

The Presidency further recalls that those situations in which a judge *has* been excused for reason of his or her previous involvement in the case have generally involved such judges having issued a decision on the confirmation of charges and/or having been directly involved in issuing the decision subject to appeal.¹⁸ Further, in a confidential decision in which two members of the Presidency were excused from exercising judicial review functions in the Presidency due to having previously considered similar issues before a Trial Chamber, the Presidency noted particularly, in granting the request for excusal, the “very high degree of congruence between the

¹⁵ Decision of 23 September 2009, page 6.

¹⁶ Decision on the request of Judge Akua Kuenyehia of 18 February 2010 to be excused from participating in the exercise to reclassify documents in the appeals proceedings related to the case of *The Prosecutor v. Bosco Ntaganda* and in all appeals in the case, 24 September 2010, as contained in ICC-01/04-584-Anx4 and ICC-01/04-02/06-30-Anx4 of 11 November 2010, page 5.

¹⁷ Decision on the requests of Judge Akua Kuenyehia and Judge Anita Ušacka of 14 July 2011 to be excused from the appeal in the case of the *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, 1 August 2011, as contained in ICC-02/05-03/09-191-Anx2, 8 August 2011, page 5; Decision on the request of Judge Anita Ušacka of 16 February 2010 to be excused from participating in the exercise to reclassify documents in the appeals proceedings related to the case of *The Prosecutor v. Bosco Ntaganda*, pursuant to article 41(1) of the Rome Statute and rule 35 of the Rules of Procedure and Evidence, 24 September 2010, as contained in ICC-01/04-584-Anx3 and ICC-01/04-02/06-30-Anx3 of 11 November 2010, page 4; Decision of 23 September 2009, page 8.

¹⁸ See e.g. Decision on the request to be excused from the exercise of judicial functions in the Appeals Chamber pursuant to article 41 of the Rome Statute, 15 March 2012, ICC-01/04-01/10-500-Anx2; Decision on the request of 15 July 2010 to be excused from sitting in the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 and from sitting in all future appeals arising in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, 16 July 2010, as contained in ICC-01/04-01/06-2813-Anx2, 6 October 2011; Decision on the request of 16 February 2010 to be excused from sitting in the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 20 November 2009 and from sitting in all future appeals arising in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, 8 March 2010, ICC-01/04-01/07-1949-Anx2.

legal issues before the Presidency and those adjudicated upon in the Trial Chamber Decision and further noted that the factual determinations made by the applicants in the Trial Chamber Decision were based on the same evidence that the Presidency must consider in the Application”.¹⁹

In the instant case, the Presidency notes that the applicant has not participated in the decision subject to appeal before the Appeals Chamber, but has participated in an earlier decision which she indicates was similar in nature. The appeal concerns whether the Pre-Trial Chamber erred in determining that there was no admissibility challenge before the Chamber at the relevant time, referring to the possibility of postponement pursuant to article 95 of the Rome Statute. In contrast, as set out in the factual background above, the issue addressed by the applicant in the First Postponement Decision was entirely separate from the issue of the existence of an admissibility challenge, but rather concerned whether a postponement could be granted pursuant to article 94.

In such circumstances, the Presidency considers that the First Postponement Decision, on one hand, and the Second Postponement Decision and the appeal as it is currently framed, on the other, raise distinct legal issues, with the applicant’s involvement in the First Postponement Decision providing no basis for a reasonable observer to doubt her impartiality in the appeal.

For the aforementioned reasons, the request for excusal is denied.

The Presidency shall make public the request for excusal and this decision, noting that the applicant has expressed her consent in accordance with rule 33(2) of the Rules.

¹⁹ ICC-RoR221-04/09-2-Conf-Exp-Anx2.